SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 696

ELTA KENWARD, PETITIONER,

vs.

THE "ADMIRAL PEOPLES", HER ENGINES, BOILERS, APPAREL, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Ninth Circuit	A	1
Caption ..... (omitted in printing)	A	
Record from D. C. U. S., District of Oregon	1	1
Caption ..... (omitted in printing)	1	
Libel	1	1
Claim of owner	6	4
Exceptions to libel	7	5
Order sustaining exceptions	8	5
Decree	9	5
Notice of appeal	10	6
Assignments of error	11	6
Bond on appeal ..... (omitted in printing)	12	
Praecipe for transcript of record	14	7
Order allowing appeal, etc.	15	8
Order approving bond	16	8
Affidavit of Wm. P. Lord	17	9
Order permitting libelant to appeal cause without prepayment of fees	18	9
Clerk's certificate ..... (omitted in printing)	20	
Order of submission	23	10
Order directing filing of opinion and decree	24	11
Opinion, Wilbur, J.	25	12
Decree	28	14
Clerk's certificate ..... (omitted in printing)	29	
Order allowing certiorari	30	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 6, 1935.

—6049-C

[fols. a-d] [Captions omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

ELTA KENWARD, Libelant,

vs.

Steamship "ADMIRAL PEOPLES", Her Engines, Boilers, Apparel, etc., Respondent

LIBEL IN REM—Filed Aug. 19, 1933

To the Honorable John H. McNary and James Alger Fee, Judges of the above entitled court;

The libel of El. Kenward against the steamship "Admiral Peoples", her engines, boilers, apparel, etc., in a cause of damages, civil and maritime, says:

Article I

At and during all the times herein mentioned the steamship "Admiral Peoples" was an ocean-going vessel engaged in the carriage of passengers and freight between the ports of the State of California and the State of Oregon.

[fol. 2]

Article II

On or about the 10th day of May, 1932, at Wilmington, State of California, libelant boarded said steamship "Admiral Peoples" as a passenger for hire for transportation thereon from the said port of Wilmington to the port of Portland in the State of Oregon, and libelant paid respondent for her passage to the port of Portland, Oregon.

Article III

At the time of taking passage on said steamship "Admiral Peoples" as aforesaid, libelant was of the age of seventy-three years, and immediately prior to the occurrence hereinafter set forth libelant enjoyed good health and was in possession and full use of all of her physical and mental faculties.

Article IV

On or about the 15th day of May, 1932, the said steamship "Admiral Peoples" docked at the port of Portland at a wharf regularly used by the said vessel in receiving and discharging passengers, for the purpose of permitting libelant to disembark from said vessel.

Article V

At the time and place aforesaid, respondent, its officers and agents, placed or caused to be placed a gang plank leading from one of the decks of said vessel to the wharf, and said gang plank sloped from the ship toward the wharf at an angle of from ten to fifteen degrees. The gang plank was approximately 2 feet in width and 18 feet in length, and was equipped with the usual rope railings which termi- [fol. 3] nated approximately 3 feet from each end of the gang plank. The gang plank was so constructed that when put in place as aforesaid, the level of the plank at the shore end was about 6 inches above the level of the dock, thereby creating a step from the plank to the dock. After respondent's steamship had been docked and the gang plank placed as aforesaid, upon instructions from one of respondent's officers, libelant proceeded along said gang plank toward the dock, and as libelant reached the lower end of said gang plank, being then and there wholly unaware of the step between the lower end of the gang plank and the dock, and there being no warning furnished or given to libelant of the presence of said step, libelant fell from said gang plank and was violently and forcibly thrown forward upon the dock in such manner as to cause the injuries hereinafter set forth. By reason of said fall, libelant sustained a fracture of the neck of the left femur and bruised, tore and injured the muscles, ligaments, tendons and nerves of her pelvic region and lumbar spine.

Article VI

Libelant's injuries were caused solely by the carelessness, recklessness and negligence of the respondent, her officers and agents, in the following particulars:

1. Respondent, her officers and agents, failed and neglected to furnish and maintain for libelant's use a gang

plank which at the shore end would be flush with the dock or taper off to the level of the dock.

2. Respondent, its officers and agents, furnished for libel-[fol. 4] ant's use a gang plank which at its shore end had a step which was dangerous to the life and limb of passengers using said gang plank and particularly dangerous to the life and limb of libelant.

3. Respondent, its officers and agents, failed and neglected to furnish and maintain for libelant's use a hand-rope or railing extending along either side of said gang plank to the shore end thereof.

4. Respondent, its officers and agents, failed and neglected to post and maintain at the shore end of said gang plank a sign or warning notice of said step.

5. Respondent, its officers and agents, failed and neglected at said time and place to maintain a man at said step for the purpose of warning libelant of said step and for the purpose of assisting libelant to step from said gang plank to the dock.

Article VII

By reason of the injuries sustained by libelant as aforesaid, libelant has suffered and will continue to suffer great physical pain and mental anguish, and the use of her leg and back will be permanently impaired, all to her damage in the sum of Ten Thousand Dollars ($10,000.00). By reason of the injuries hereinabove set forth, libelant was confined in a hospital in the City of Portland, Oregon, and was compelled to incur expenses for medical treatment and will continue to require medical treatment in the future, to her further damage in the sum of One Thousand Dollars ($1,000.00).

[fol. 5] Article VIII

All and singular the matters and things herein alleged are true and within the admiralty and maritime jurisdiction of this honorable court. The steamship "Admiral Peoples" is now lying afloat in the Willamette River and within the jurisdiction of this honorable court.

Wherefore libelant prays that process in due form of law according to the rules and practice of this honorable court

in causes of admiralty and maritime jurisdiction may issue against the steamship "Admiral Peoples", her boilers, engines, apparel, etc., and that all persons having or claiming to have any interest therein be cited to appear and answer all and singular the matters aforesaid; that this honorable court may be pleased to decree to the libelant her damages with interest and costs, and that the said steamship "Admiral Peoples", her boilers, engines, apparel, etc., may be condemned and sold to pay the same, and that libelant have such other and further relief as in law and justice she may be entitled to receive.

Lord, Moulton & Krause, Roscoe P. Hurst and R. L. McGrew, Proctors for Libelant.

Duly sworn to by Elta Kenward. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 6] IN UNITED STATES DISTRICT COURT.

CLAIM OF OWNER—Filed Sept. 7, 1933

Comes now Portland California Steamship Company, a corporation organized and subsisting under the laws of the State of California, intervening for the interest of itself as owner of the "Admifal Peoples", its engines, boilers, apparel, etc., before this honorable court, and makes claim to the said vessel, its engines, boilers, apparel, etc., as the same are proceeded against in this cause at the instance of Elta Kenward, libelant, and the said claimant, Portland California Steamship Company, avers that it was at the time of the filing of the libel herein and still is the true and bona fide sole owner of the said "Admiral Peoples", its engines, boilers, apparel and furniture, and that no other person is the owner thereof.

Wherefor Portland California Steamship Company prays leave to defend accordingly.

Portland California Steamship Company, by McCamant, Thompson and King, Its Proctors.

[fol. 7] *Duly sworn to by Wallace McCamant. Jurat omitted in printing.*

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

EXCEPTIONS TO LIBEL—Filed Sept. 7, 1933

Comes now Portland California Steamship Company, claimant aforesaid, and excepts to the libel herein upon the following grounds:

(1) That the facts averred in the libel are insufficient to constitute a cause of suit or action cognizable in admiralty or with the maritime jurisdiction of this court.

(2) That the facts averred in the libel are insufficient to entitle libelant to a maritime lien on the Steamship "Admiral Peoples", its engines, boilers, apparel, etc., or any thereof.

[fol. 8] (3) That the facts averred in the libel are insufficient to constitute a cause of action in rem against the respondent vessel aforesaid.

McCamant, Thompson and King, Proctors for Claimant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUSTAINING EXCEPTIONS—March 19, 1934

This cause was heard by the Court upon claimant's exceptions to the libel herein, and was argued by Mr. William P. Lord, of proctors for plaintiff, and by Mr. Ralph H. King, of proctors for claimant. Upon consideration whereof,

It is ordered that said exceptions be and the same are hereby sustained.

[fol. 9] IN UNITED STATES DISTRICT COURT

DECREE—Filed April 2, 1934

The court having sustained the exceptions of claimant to the libel on the 19th day of March, 1934, and no amended

libel having been filed by libelant, and proctors for libelant having stated in open court that there is no intention on their part to amend, it is

Considered, adjudged and decreed that the libel be and it is hereby dismissed and that claimant do recover its costs and disbursements of and from libelant. Libelant is allowed an exception to the passing of this decree.

John H. McNary, Judge.

Dated April 2, 1934.

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed June 18, 1934

To the Steamship "Admiral Peoples", above named respondent, and to Portland California Steamship Company, above-named claimant, and to Messrs. McCamant, Thompson & King, your proctors:

You and each of you are hereby notified that Elta Kenward, libelant in this suit, intends to appeal and does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree and order heretofore and on the 2d day of April, 1934, made and entered in this suit, which said final decree adjudged that the libel be dismissed with costs, and libelant hereby appeals from the said final decree and the whole thereof.

Dated at Portland, in the District of Oregon, this 15th day of June, 1934.

Elta Kenward, Libelant, by Wm. P. Lord, Her Proctor.

[File endorsement omitted.]

[fol. 11] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 18, 1934

Now comes the above named Libelant and says that in the record and proceedings in the above entitled cause there is manifest error, and said libelant now makes, files and

presents the following assignment of errors upon which she will rely:

I

The court erred in holding that this cause was not cognizable in admiralty.

II

The court erred in sustaining claimant's exceptions to the libel in this cause.

III

The court erred in dismissing the libel in this cause and entering a decree in favor of claimant.

Wherefore libelant prays that the decree of the District Court in this cause be reversed.

Wm. P. Lord, Proctor for Libelant.

[File endorsement omitted.]

[fols. 12 & 13] Bond on appeal for $250.00, approved and filed June 18, 1934, omitted in printing.

[fol. 14] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 18, 1934

The clerk of this court is hereby directed to prepare and certify a copy of the record in the above entitled cause for the use of the United States Circuit Court of Appeals for the Ninth Circuit, including the following documents, omitting verification of pleadings, admissions of service and endorsements on covers, other than date of file marks, and also omitting title of cause other than set forth in the libel:

Libel.
Answer.
Exceptions to Libel.
Claim of Owner.
Decree.
Notice of Appeal.

Undertaking on Appeal.
Assignment of Errors.
Order Allowing Appeal and Fixing Bond.
Order Approving Bond.

Wm. P. Lord, Proctor for Libelant.

[File endorsement omitted.]

[fol. 15] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND FIXING BOND—Filed June 19, 1934

Now, on libelant's motion,

It is ordered that the notice and petition for appeal herein be and the same is hereby allowed, and the amount of libelant's bond be and the same hereby is fixed in the sum of Two Hundred Fifty Dollars ($250.00).

Dated this 19th day of June, 1934.

John H. McNary, Judge.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

ORDER APPROVING BOND—Filed June 19, 1934

Based upon the record herein,

It is now here ordered that the bond on appeal with W. C. Lord as surety be and it hereby is approved.

Dated this 19th day of June, 1934.

John H. McNary, Judge.

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF WM. P. LORD—Filed June 27, 1934

UNITED STATES OF AMERICA,
District of Oregon, ss:

I, Wm. P. Lord, being first duly sworn, on oath say: I am proctor for libelant in the above entitled cause; That said libelant has good grounds for appealing this cause to the United States Circuit Court of Appeals for the Ninth Circuit, and said grounds are set forth in the Assignment of Errors filed herein; that said libelant is a citizen of the United States, residing in the State of California.

That said libelant is of the age of 75 years, or thereabouts, and in ill health, and has no income or funds, and is dependent for her support and maintenance upon relatives; that libelant has no money and is unable to secure any money with which to pay the clerk's fees and prepare a transcript on appeal, and is unable to pay the costs of printing the transcript and a brief on appeal, and also unable to pay the cost of docketing said cause with the clerk of the United States Circuit Court of Appeals.

That libelant therefore desires to proceed in this cause in forma pauperis and libelant agrees with the court that if a decree for damages is subsequently secured in this cause, [fol. 18] she will pay the clerk's fees for filing and certification.

Wm. P. Lord.

Subscribed and sworn to before me this 26th day of June, 1934. Marie Bennett, Notary Public for Oregon. My commission expires Feb. 17, 1937. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER PERMITTING LIBELANT TO APPEAL WITHOUT PREPAYMENT OF FEES—Filed June 27, 1934

Upon reading the affidavit of Wm. P. Lord, proctor for libelant herein, for permission to appeal this cause in forma pauperis:

It is ordered that the said libelant be and she hereby is permitted to appeal this cause without prepayment of the clerk's fees for preparing a transcript of record and certifying to the same, and the fees of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit for [fol. 19] docketing the cause, and filing the transcript of record, and the libelant is hereby granted leave to file a typewritten transcript of the record and briefs on appeal, but in event said libelant subsequently secures a decree for damages in this cause, libelant and counsel are admonished to pay the clerk's fees incurred herein for filing and certification.

Dated this 27th day of June, 1934.

John H. McNary, Judge.

[File endorsement omitted.]

[fol. 20] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 21 & 22] Service by copy admitted this 12th day of July, 1934.

Wallace McCamant, of Proctors for Appellee.

[File endorsement omitted.]

[fol. 23] In United States Circuit Court of Appeals, Ninth Circuit

No. 7545

Elta Kenward, Appellant,

vs.

Portland California Steamship Company, Claimant of, and the SS. "Admiral Peoples", etc., Appellees

Present: Honorable Curtis D. Wilbur, Senior Circuit Judge, Presiding; Honorable William H. Sawtelle, Circuit Judge; Honorable Francis A. Garrecht, Circuit Judge.

ORDER OF SUBMISSION—Sept. 12, 1934

Ordered appeal in above cause argued by Mr. Wm. P. Lord, proctor for appellant, and by Mr. Wallace McCamant, proctor for appellees, and submitted to the court for consideration and decision.

[fol. 24] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE—Oct. 16, 1934

By direction of the court, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[fol. 25] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 7545

ELTA KENWARD, Appellant,

vs.

The "ADMIRAL PEOPLES", Her Engines, Boilers, Apparel, etc., PORTLAND CALIFORNIA STEAMSHIP COMPANY, Claimant, Appellee

Upon Appeal from the District Court of the United States for the District of Oregon

Before Wilbur, Sawtelle and Garrecht, Circuit Judges

OPINION—Filed Oct. 16, 1934

WILBUR, Circuit Judge:

This is an appeal from a decree in admiralty sustaining appellee's exceptions to the appellant's libel in rem, which raised the question of the jurisdiction of the admiralty

court over the tort upon which the appellant based her action.

"The appellant was a passenger on the "Admiral Peoples" and was injured while disembarking from the vessel by falling upon the dock as she attempted to step from the gang plank. The negligence complained of was in furnishing a gang plank which required the passenger to step down six inches to the dock when leaving the gang plank. The passenger was seventy-three years of age at the time and as result of her fall suffered severe injuries.

It is well settled that injuries occurring upon the dock are injuries upon the land and that admiralty has no jurisdiction over the place of injury. The cases in which this principle has been applied are so numerous that we deem it unnecessary to enter into an extended discussion of them. Recent decisions of the Supreme Court (State Industrial [fol. 26] Comm. v. Nordenholt, 259 U. S. 263; Smith & Son v. Taylor, 276 U. S. 179; Nogueira v. N. Y., N. H., & H. R., 281 U. S. 128; Employers' Liability Corp. v. Cook, 281 U. S. 233; Spencer Kellogg & Sons v. Hicks, In re "Linseed King", 285 U. S. 502; L'Hote, et al. v. Crowell, Dep. Comm., 286 U. S. 528; Vancouver S. S. Co. v. Rice, 288 U. S. 445) have so definitely settled the questions involved in this case that it is unnecessary to consider earlier decisions of the lower federal courts which conflict with the decisions of the Supreme Court announced in these recent cases, upon some of which appellant relies. The tenor of these recent decisions will be indicated by the following quotations:

In Smith & Son v. Taylor, supra, the Supreme Court said:

"Deceased was engaged in maritime work under a maritime contract. If the cause of action arose upon the river, the rights of the parties are controlled by maritime law, the case is within admiralty and maritime jurisdiction, and the application of the Louisiana Compensation Law violated Sec. 2 of Art. 3. But, if the cause of action arose upon the land, the state law is applicable. The Plymouth, 3 Wall. 20, 33; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 59; Southern Pac. Co. v. Jensen, 244 U. S. 205; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149; Washington v. Dawson & Co., 264 U. S. 219. Plaintiff in error concedes that the stage and wharf on which deceased was working are to be deemed an extension of the land (Cleveland Terminal R. R. v.

Steamship Co., 208 U. S. 316, 321; Industrial Comm. v. Nordenholt Co., 259 U. S. 263, 275) * * *."

Appellant contends that the question of maritime jurisdiction in the gang plank cases depends upon whether or not the person injured was getting on or off the ship and not whether the injury occurred upon the wharf or the ship. This is incorrect. The distinction is the place of the injury. This can perhaps best be illustrated by a recent memorandum decision by the Circuit Court of Appeals of the fifth circuit, L'Hote v. Crowell, 54 F. (2d) 212. A longshoreman who had been engaged in loading a ship alongside the wharf had been working on the wharf. We quote portions of the decision:

"He had been ordered to go on board to assist in closing the ship's hatches when all the bags had been removed from [fol. 27] the wharf; and in carrying out that order he rode the last load up from the wharf. As the sling was swinging backward and forward it struck against either the rail or the side of the ship, with the result that Richard Payne was knocked off the load back on the wharf and fatally injured. * * * In this case the longshoreman Payne had finished his work on the wharf and from the time he was lifted from it by the sling by means of the ship's tackle was under the control of an instrumentality of the ship. We are of opinion that his situation was the same as it would have been had he been physically on board the ship."

The Supreme Court rejected this view and directed that the order of the Deputy Commissioner rejecting the claim be affirmed.

Decree affirmed.

[File endorsement omitted.]

[fol. 28] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 7545

ELTA KENWARD, Appellant,

vs.

PORTLAND CALIFORNIA STEAMSHIP Co., Claimant of, and the "ADMIRAL PEOPLES", Her Engines, Boilers, Apparel, etc., Appellees

Appeal from the District Court of the United States for the District of Oregon

DECREE—Filed Oct. 15, 1934

This *came* came on to be heard on the apostles on appeal from the District Court of the United States for the District of Oregon, and was duly submitted;

On Consideration whereof, It is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellees and against the appellant.

It is further ordered, adjudged and decreed by this court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[File endorsement omitted.]

[fol. 29] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 29½] Service by copy admitted this 12th day of July, 1934.

Wallace McCamant, of Proctors for Appellee.

[fol. 30] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 4, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,324. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 696. Elta Kenward, petitioner, vs. The "Admiral Peoples", her engines, boilers, apparel, etc., et al. Petition for a writ of certiorari and exhibit thereto. Filed February 11, 1935. File No. 696, O. T., 1934.